IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[List of Counsel on Inside Cover]

## COUNSEL FOR PETITIONERS

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, comprised of:

Arizona Electric Power Cooperative, Inc.
Arizona Power Authority
Arizona Public Service Company
City of Anaheim
City of Burbank, Public Service Department
City of Colorado Springs, Department of Public Utilities
City of Glendale, Public Service Department
City of Los Angeles, Department of Water & Power
City of Pasadena, Water & Power Department
Colorado-Ute Electric Association, Inc.
El Paso Electric Co.
Imperial Irrigation District
Nevada Power Co.
Pacific Power & Light Co.
Public Service Co. of Colorado
Public Service Co. of New Mexico
Salt River Project Agricultural Improvement and Power District
San Diego Gas & Electric Co.
Sierra Pacific Power Co.
Southern California Edison Co.
Tucson Gas & Electric Co.
Utah Power & Light Co.

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Bruce Norton
Snell & Wilmer
3000 Valley Center
Phoenix, Arizona 85073

UTAH INTERNATIONAL, INC.

C. C. Dietrich
550 California Street
San Francisco, California 94104

Richard N. Carpenter
Bigbee, Byrd, Carpenter & Crout
P. O. Box 669
Santa Fe, New Mexico 87501

Robert M. Westberg
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

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## CITATIONS

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This petition is filed on behalf of Western Energy Supply and Transmission Associates, intervenor in No. 74-2063 below, a trade association of twenty two major public and private utilities operating in eleven Western States; and individually on behalf of Arizona Electric Power Cooperative, Inc., Arizona Public Service Company, Nevada Power Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company, all of which are electrical utilities which were petitioners in No. 75-1764 below; and

on behalf of Utah International, Inc., a coal mining company which was a petitioner in No. 75-1372 below.[1]

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.

## OPINION BELOW

The Opinion of the Court of Appeals has not yet been published in the official reports, but it has been published at 9 E.R.C. 1129.[2]

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Clean Air Act authorizes the Administrator of the Environmental Protection Agency to adopt

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[1] Insofar as petitioners can determine, the parties to the consolidated proceedings below that will be adverse respondents to the petition are the United States Environmental Protection Agency, its Administrator (Russell E. Train), Sierra Club, the Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, and the States of New Mexico and Nevada. The remaining interested parties below are automatically respondents to this petition, pursuant to this Court's Rule 21(4), but, insofar as petitioners know, they will not be adverse to this petition. Those Rule 21(4) respondents are listed in Appendix E hereto. Two members of Western Energy Supply and Transmission Associates, Utah Power and Light Company and Public Service Company of Colorado, have filed a separate petition, rather than joining in this petition; and Pacific Power and Light Company joined in the petition of Montana Power Company, *et al.*, No. 76-529.

[2] The opinion, which exceeds 50 printed pages in length, and formal judgment are reproduced in full as Appendices A and C to the petition of Montana Power Company, *et al.*, No. 76-529. Because of their volume, they are not reproduced herein.

regulations which grant to Federal Land Managers and Indian Governing Bodies power to control reclassification of lands.

2. Whether the issue of unlawful grant of authority over air quality to Federal Land Managers and Indian Governing Bodies is ripe for review.[3]

## CONSTITUTION, STATUTE AND REGULATIONS INVOLVED

The regulations being reviewed, 40 C.F.R. §§ 52.01 (d), (f), and 52.21 (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975), are set forth in Appendix A hereto. The relevant provisions of the Constitution and of the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are set forth respectively in Appendices C and B hereto.

## STATEMENT OF THE CASE

This case involves review of regulations promulgated by Respondent Environmental Protection Agency (EPA) on November 27, 1974. 39 Fed Reg. 42509, *et seq.* (Dec. 5, 1974). The regulations have been generically referred to as the "significant deterioration regulations".

The regulations were promulgated as a result of an order of the United States District Court for the District of Columbia entered on May 30, 1972, in the case of *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C. 1972). A panel of the Court of Appeals for the District of Columbia Circuit affirmed, per curiam, *Sierra Club v. Ruckelshaus*, 4 E.R.C. 1815 (D.C. Cir. 1972), and this Court affirmed without opinion by an equally divided Court. *Fri v. Sierra Club*, 412 U.S. 541 (1973).

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[3] The petition of Montana Power Company, *et al.*, presents a number of questions for review. Petitioners here concur in both the delineation of questions presented and reasons presented therein for the granting of a Writ of Certiorari. The two questions presented in the instant petition are similar to the questions enumerated as Question 2(d) in the petition of Montana Power Company, at 3, but which were not discussed therein.

The only written opinion, that of District Court Judge Pratt, ordered EPA to disapprove all state implementation plans which did not provide for the prevention of significant deterioration of existing air quality where that air quality was better than that required by the national secondary standards. The order further required EPA to promulgate regulations to prevent significant deterioration.

In response to that order EPA disapproved the implementation plans of all States insofar as they did not provide for the prevention of significant deterioration (37 Fed. Reg. 23836 (Nov. 9, 1972)) and promulgated the regulations at issue here.[4]

Petitioners in this action were among those who sought judicial review of the regulations pursuant to § 307(b) (1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1). In all, fourteen petitions were filed in several Circuit Courts of Appeal and all petitions were eventually consolidated in the Court of Appeals for the District of Columbia Circuit. A panel of that Court rendered its decision on August 2, 1976, affirming the regulations.

The regulations set forth three classifications of all areas which already meet the federal primary and secondary standards for sulfur oxides and particulates. Classes I and II allow only sharply limited incremental increases in existing levels, while Class III is set at the level of the secondary standards. 40 C.F.R. § 52.21(c)(2). Class I is to be used for areas in which "practically any change in the air quality would be considered significant"; Class II is for areas where significant would be more than that "normally accompanying moderate well-controlled growth"; and Class III would allow "deterioration of air quality up to the national stan-

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[4] The text of the regulations within 39 Fed. Reg. 42509 (Dec. 5, 1974), *as amended*, 40 Fed. Reg. 2802 (Jan. 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. Reg. 42011 (Sept. 10, 1975), and pertinent portions of the preamble to the December 5, 1974 promulgation are reproduced in Appendix A.

dards". 39 Fed. Reg. 42510. All areas are initially designated as Class II. 40 C.F.R. § 52.21(c)(3)(1).

The most pertinent portions of the regulations for purposes of this petition are the provisions for reclassification. The regulations grant to the States the power to reclassify areas within the State, including all federal lands within their borders, provided that the States have followed certain specified procedures and have taken into account certain specified considerations. 40 C.F.R. §§ 52.21(c)(3)(ii) and (iii). They then provide in § 52.21(c)(3)(iv) that "Federal Land Managers" and "Indian Governing Bodies" may reclassify lands within their respective jurisdictions, provided only that they follow equivalent procedures, take into account the same considerations, and consult with the affected States.[5] Federal Land Managers can reclassify federal lands only to a more restrictive class. The Administrator of EPA has no discretion to disapprove any proposed reclassification unless he determines that the proposer has arbitrarily and capriciously disregarded the specific substantive considerations or failed to comply with the designated procedures. 40 C.F.R. § 52.21(c)(3)(vi).

## REASONS FOR GRANTING THE WRIT

### I. THE CLEAN AIR ACT DOES NOT AUTHORIZE THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY TO ADOPT REGULATIONS WHICH GRANT TO FEDERAL LAND MANAGERS AND INDIAN GOVERNING BODIES POWER TO CONTROL RECLASSIFICATION OF LANDS

[5] It should be noted that private persons or businesses may not propose reclassifications; nor are there any procedures for forcing a State, Federal Land Manager or Indian Governing Body to propose reclassifications.

### A. The Clean Air Act Mandates State Control of Air Quality Within the Entire Geographic Area of the State, Subject Only to EPA Supervision

The Clean Air Act expressly grants primary responsibility over air quality to the States. Section 101(a)(3) provides "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments". 42 U.S.C. § 1857(a)(3). Section 107(a) provides:

> *Each State* shall have the primary responsibility for assuring air quality *within the entire geographic area comprising such State* by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State. 42 U.S.C. § 1857c-2(a) (Emphasis added).

The Act is clear that once the Environmental Protection Agency has prescribed the national standards to be achieved and maintained, it is for the States to develop and implement plans for meeting the standards. In addition, § 116 of the Act [42 U.S.C. § 1857d-1] specifically reserves to each State the right to impose stricter controls than are required by federal law.

The legislative intent to vest each State with control over air quality within the entire geographic area comprising that State is also manifested by § 118 of the Act, which, provides that all government agencies and departments with jurisdiction over any property, "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements". 42 U.S.C. § 1857f.

This statutory scheme has been recognized in several cases considering the Clean Air Act. In *Duquesne Light Co. v. EPA*, 481 F.2d 1, 3 (3d Cir. 1973), for example, the Court

agreed that the Clean Air Act granted control over air quality planning to the States, subject to EPA's supervision.

> In enacting the Clean Air Act Amendments of 1970, Congress attempted to foster a symbiosis between two perceived needs. First, Congress wanted to preserve the basic state and local control of the design and enforcement of air pollution regulations. . . . Second, . . . there was a desire for federal standards and enforcement. . . .
>
> The result of these two conflicting strains was that Congress in the 1970 Amendments, devised a system in which certain aspects of the pollution control effort were assigned exclusively to the EPA, other aspects being entrusted to the states under federal supervision.

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, __, 95 S. Ct. 1470, 1474 (1975), Mr. Justice Rehnquist made the following observation with respect to the 1970 Amendments to the Clean Air Act:

> These Amendments sharply increased federal authority and responsibility in the continuing efforts to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .' § 107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. § 1857c-2(a).

*See also Washington v. General Motors Corporation*, 406 U.S. 109, 114-16 (1972).

In summary, the Clean Air Act, by its explicit language and as judicially construed, mandates that each State shall control air quality within its own entire geographic area, subject only to supervision by EPA.

B. The Regulations Contravene the Mandate of the Clean Air Act that Each State Shall Control Air Quality Within Its Own Entire Geographic Area by Allowing

Reclassification of Areas Within a State Independently of Control by that State.

The EPA regulations at issue contravene the express mandate of State control by granting to Indian Governing Bodies and Federal Land Managers the authority over air quality on federal and Indian lands, as well as large areas of State and private land. The regulations thus unlawfully derogate from the primary responsibility and authority of the States under the Act to assure air quality of all lands within their geographic boundaries.

There is no language in the Act which, either expressly or by implication, allows the special treatment of federal and Indian lands within a State. But, in withdrawing reclassification of lands from State control, these regulations affect not only those federal and Indian lands themselves, but neighboring State and private lands as well. This is because the construction or modification of a source covered by the regulations will not be permitted if the effect of that source on air quality concentrations will cause a violation either of the air quality increments applicable in the immediate area *or the increments applicable in any other areas.* 40 C.F.R. § 52.21(d) (2) (i). EPA itself has emphasized the dramatic effect of this provision:

> Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for $SO_2$ could under some conditions violate the Class I increment for $SO_2$ 60 or more miles away. . . . Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. . . . [I]t should be clear

> that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. 39 Fed. Reg. 42512 (Dec. 5, 1974).

EPA acknowledged that this "drift factor" could limit growth outside a Class I area as much as 60 to 100 miles. *Id.* at 42513. The reclassification of federal or Indian lands can dictate growth and development on adjacent State and private lands for many miles around.

By allowing federal and Indian lands to be reclassified independently of State control, the regulations treat those lands differently from all other lands in the States and grant to Federal Land Managers and Indian Governing Bodies a decision-making power equal to that of the States themselves. Insofar as the prevention of significant deterioration is concerned, there is nothing inherent in the nature of air quality above federal or Indian lands which per se should remove its protection from State control. Indeed, as noted earlier, with regard to federal lands and entities, § 118 explicitly provides that they shall be subject to the same State and other requirements as other persons within the State. Similarly, with regard to Indian lands and entities, it is well settled that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary...." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). Since the Clean Air Act contains no special provisions for Indian tribes, they are subject to all the provisions thereof, including those granting the States the responsibility and authority, subject to EPA's supervision, for implementing the Act within their borders.[6] In short, by granting Federal Land Managers

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[6] Several petitioners below argued that the regulations in question violated rights of due process under the United States Constitution. The allocation of the responsibility for reclassification of Indian lands by In-

[Continued]

and Indian Governing Bodies a separate decision-making power from that of the States, EPA has purported to grant authority which the Act does not give it to grant. It has also attempted to confer that authority on political entities whom the Act did not intend should have such authority.

The power granted federal agencies and Indian Governing Bodies creates particularly severe problems in the eleven Western States served by petitioners because of the extensive amounts of federal and Indian lands and the checkerboard land ownership patterns in those States.[7]

The petitioner which intervened in No. 74-2063 and petitioners in No. 75-1764 below are all charged with providing essential electric service to consumers in the West; and, in order to carry out their mandates, must continue to construct and operate fossil fuel steam electric plants. The petitioner which petitioned in No. 75-1372 below is engaged in mining coal, on and off Indian reservations, for use in such plants and, prospectively, for manufacture on-site into

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dian Governing Bodies and the "reach" of such reclassifications beyond the Indian land borders is an example of such a denial of due process rights. While petitioners could seek judicial review of a Federal Land Manager's actions or that of a State in federal or State courts, respectively, there is no judicial forum in which to review the Indian Governing Body action. Judicial review of the actions of Indian tribes under these regulations would only be available in the narrow sense of seeking review of EPA's approval of any reclassification.

[7] The statistics regarding ownership of land in two representative Western States, New Mexico and Arizona, are as follows:

| | New Mexico* Percent of Ownership | Arizona** Percent of Ownership |
|---|---|---|
| Federal | 33.3 | 44.5 |
| State | 11.8 | 13.2 |
| Private | 45.5 | 15.3 |
| Indian | 9.3 | 27.0 |

* Source: Federation of Rocky Mountain States.

** Source: Map of Federal Lands, United States Geological Survey Map, 1968, Sheet No. 272.

synthetic natural gas. The existing and prospective plants produce emissions subject to limitation and are themselves subject to preconstruction review under the regulations. In view of the checkerboard mixture of federal, State, private and Indian lands in the Western States, the effectuation into regulation of the primary role of the States, as envisaged and mandated by the Clean Air Act, is crucial.

For example, in the Four Corners Area of Arizona, Utah, Colorado and New Mexico there are located electric generating plants owned wholly and partly by some of the intervenor and petitioner utilities in Nos. 74-2063 and 75-1747 below and coal mining operations of the petitioner in No. 75-1372 below for fuel for some of these plants and, prospectively, for synthetic fuel conversion. Within 60 to 100 miles of the existing and proposed plants within the New Mexico portion of the Four Corners region, there are four Indian reservations, two national monuments, three national forests, thousands of acres of federal public domain, as well as three other States.[8] The delegated authority to New Mexico to reclassify becomes of little value under these circumstances, since one of the considerations is the effects of the proposed redesignations on adjoining areas which include differing Indian Governing Bodies and differing Federal Land Managers, each having the power of reclassification. A protest by any one of the multiple Federal Land Managers or Indian Governing Bodies limits the circumstances under which EPA can approve the reclassification. Moreover, each can initiate its own reclassification, though the federal agencies only to a more restrictive class. This hodgepodge of conflicting "sover-

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[8] According to the Energy Committee of the New Mexico Legislature 1976, a "recent study on the northwest coal fields in New Mexico conducted by the State Geologist showed that coal ownership was 57.3 percent federal, 32 percent Indian, 5.9 percent private and 4.8 percent state".

eigns", utterly ignoring the primary role for the State in which the sources are geographically situated, creates a maze of potential vetoes for energy development that inhibits, if not curtails, petitioners' plans to meet the near and long-term energy crisis.

Because the vast majority of State and private land in the Western States lies within 60 miles of federal or Indian land, the classification of federal and Indian lands as Class I or even Class II in effect grants to entities other than the States air quality and land use control over most — and in some States all — of the lands within those States, regardless of ownership. The regulations at issue abrogate Congress' grant to the States of the primary responsibility and authority to assure air quality and to make land use decisions within their own borders. At least to the extent of that abrogation, the regulations are inconsistent with the Clean Air Act and exceed the authority granted to EPA by the Act.

## II. THE ISSUE OF UNLAWFUL GRANT OF AUTHORITY OVER AIR QUALITY TO FEDERAL LAND MANAGERS AND INDIAN GOVERNING BODIES IS RIPE FOR REVIEW

### A. The Circuit Court Decision Creates a Conflict Among the Circuits on the Issue of Exclusivity of Review Under the Clean Air Act

An important reason for granting the writ is to resolve a conflict among the Circuits resulting from the decision of the Circuit Court for the District of Columbia that the issue of unlawful grant of authority over air quality within a State to Indian Governing Bodies and Federal Land Managers was not ripe for review. 9 E.R.C. 1129, 1147-48. By its "deferral of this question until it arises in a more concrete context" (9 E.R.C. 1148), the Court holds that petitioners would have the right to litigate the issue in some court at a

later time.[9] That view is directly contrary to decisions of the Circuit Courts of Appeal for the Third, Seventh, Ninth and Tenth Circuits, as well as numerous Federal District Courts, all of which stand for the proposition that a § 307 (b) (1) [42 U.S.C. § 1857h-5 (b) (1)] action is the *exclusive* method of review of EPA promulgations such as the implementation plan under review in this case. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973); *Plan for Arcadia, Inc. v. Anita Associates*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Utah Internat'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973); *Anaconda Company v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973); *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305, 309 (N.D. Ohio 1974); *Arizona Public Service Company v. Fri*, 5 E.R.C. 1878 (D. Ariz. 1973); *Hagedorn v. Union Carbide Corporation*, 363 F. Supp. 1061, 1068 (N.D. W.Va. 1973); *Delaware Cit. For Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1046 (D. Del. 1973), *aff'd* 510 F.2d 969 (3d Cir. 1975).

In this case the regulations being challenged were promulgated under § 110c-5(c) [42 U.S.C. § 1857c-5(c)], as identical implementation plans for each State to prevent significant deterioration of air quality. The cases cited above hold that a challenge to a promulgation under § 110c-5 must be brought in the United States Court of Appeals for the appropriate Circuit within 30 days of the promulgation. § 307 (b) (1). In *Getty Oil Company (Eastern Operations) v. Ruckelshaus, supra*, the Court said:

> If Congress specifically designates a forum for judicial review of administrative action, such forum is exclusive,

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[9] "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Getty Oil Company (Eastern Operations) v. Ruckelshaus, supra*, 467 F.2d at 356.

> and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review. 467 F.2d at 356.

The holding of the Court below thus squarely conflicts with holdings in the other Circuits which have dealt with the question. The issue to be resolved is extremely important, going as it does to the question of where and how review of certain major EPA promulgations may be brought.

### B. Where Congress Has Provided an Exclusive Statutory Method of Review of an Agency Regulation Within a Limited Time After Promulgation, No Additional Showing of Ripeness is Required to Obtain Review of the Regulation

Under the view prevailing in other Circuits, petitioners' challenge to the regulations at issue must be in this action. Under that view, no additional showing of ripeness is necessary.

Subject to constitutional constraints, Congress may legislate as to court jurisdiction and procedure. As long as the Article III "case or controversy" requirement is recognized, Congress may allocate judicial resources and timing of judicial review by statutorily providing that judicial access standards such as standing and ripeness are to be considered met in certain classes of cases even though, in the absence of such a statute the courts might not consider them satisfied. *Warth v. Seldin*, 422 U.S. 490, __, 95 S. Ct. 2197, 2206 (1975) (dictum on standing); *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972); compare *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937), with *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 288-89 (1928); *cf. Natural Res. Def. Coun., Inc. v. EPA*, 481 F.2d 116, 120-21 (10th Cir. 1973).

The traditional rationale for the ripeness doctrine has been to prevent courts from becoming entangled in abstract

disagreements over administrative policy and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The review procedure provided in the Act is not antithetical to that rationale. As to the first aspect of the rationale, the issue here presented is purely legal — does EPA have the right under the Act to delegate decision making to Indian Governing Bodies and Federal Land Managers? That legal issue will never become less "abstract" than it presently is. As to the second aspect of the rationale, there is no dispute that the Agency action is final and that its review is proper under § 307 (b) (1). Nor can there be any doubt that consideration of the issues raised would not constitute improper judicial interference with an administrative decision. Because of the widespread ramifications of major EPA promulgations under the Clean Air Act and the public interest in prompt resolution of any questions as to their validity, Congress explicitly provided that judicial review of such Agency action must be initiated within 30 days after promulgation.[10] By specifically providing the early "judicial interference", Congress plainly determined that the necessity for prompt review of major EPA promulgations[11] satisfied the considerations underlying both branches of the ripeness doctrine rationale.

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[10] If a petition is based solely on grounds arising after the 30th day, it may be filed after the 30th day. § 307 (b) (1). The question of whether EPA has legal authority under the Act to grant powers to Indian and federal agencies is a ground which existed upon promulgation of the regulations.

[11] Direct review in the Circuit Courts is only permitted for major final promulgations such as national air quality standards and actions concerning state implementation plans. *See* § 307 (b) (1). Traditional statutory or common law relief against a state or the Administrator is recognized in § 304 (e); and enforcement in District Courts of emission standards and required Agency action is provided for in § 304 (a).

The unlawful grant of authority to Indian Governing Bodies and Federal Land Managers has created a potential veto power over energy development, especially in the Western States served by petitioners. The very existence of that veto power will have a chilling effect on planning, investment and development for meeting our energy needs. Planning for electric power plants and other energy facilities, including assurance of adequate fossil fuel supplies, cannot proceed properly pending resolution of the conflicting jurisdictions of the States, Indian tribes and various federal agencies under the regulations. Petitioners cannot risk spending millions of dollars on planning and preparing a plant site only to have the site (or its fuel source) eliminated by a purported reclassification by an Indian tribe or manager of federal land 60 to 100 miles distant from the site.[12] Whether such Indian or federal bodies have such veto authority is seriously in doubt. It is that kind of doubt Congress sought to minimize by, in effect, inferring ripeness of purely legal questions which go directly to the underlying validity of a final regulation and providing for review in Circuit Courts within 30 days of promulgation.

In terms of reviewability under § 307 (b) (1), there is no difference between all of the other issues decided by the Circuit Court and the issues raised by this petition. They are all ripe under the review procedure established by the Act.

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[12] A "Guidance Memorandum" on the regulations from the Assistant Administrator of EPA to all Regional Administrators dated September 28, 1976, reveals the pervasive impact of the federal and Indian authority. The Administrator directed that even where a governing body merely "announces consideration" of a possible reclassification, EPA approval of a *previously* filed application for a construction permit must be withheld pending (and depending upon) EPA action on the reclassification; and this is true even where the proposed source is not to be constructed within the political boundaries of the body considering reclassification. The full text of the Memorandum appears in 7 BNA Env. Rptr., No. 23, at 859 (Oct. 8, 1976), and is reproduced in pertinent part in Appendix D.

### C. The Issue of Unlawful Granting of Authority is Purely a Legal Issue Resolvable by Statutory Construction

Either the Act grants reclassification authority to Federal Land Managers and Indian Governing Bodies or it does not. That is purely a legal issue. No factual situation will properly assist in its resolution.

The Act, comprehensive and detailed in all other respects, says absolutely nothing of "Federal Land Managers" or "Indian Governing Bodies", but places the primary responsibility for prevention and control of air pollution with the States and local governments. *See, e.g.*, §§ 101 (a) (3) and 107 (a). Statutory interpretation provides the answer to the legal question of whether authority was properly removed from the States and delegated by the Agency to the Indian and federal entities.

Therefore, this case is unlike *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), cited by the Circuit Court in support of its view on ripeness. 9 E.R.C. at 1147. Though purely legal (as here), the issue in *Toilet Goods* was not determinable by reference to the language of the law alone. This Court held there that evaluation of various problems in enforcement, supervision and administration were necessary to show "whether the statutory scheme as a whole justified promulgation of the regulation". 387 U.S. at 164. In the present case evaluation of the operation of the regulations might show whether they work well or poorly, but it cannot offer relevant assistance in interpreting the law.

The Circuit Court's avoidance of the issue was based upon its uncertainty of "how a conflict may evolve", and its speculation that EPA might someday approve a State plan which did not include the powers granted to the Indian and federal entities. 9 E.R.C. at 1148. But, it is legally unimportant how a conflict might evolve — the *power* to act has been fragmented and placed in the hands of two additional

classes of entities by final Agency action in violation of the law under which the Agency operates. It is the *threat* of exercise of that power, not its actual exercise, which already has and will continue to inhibit planning for future development. It is not a condition of ripeness that unlawfully delegated power necessarily be exercised before its legality may be challenged. *See Abbott Laboratories v. Gardner, supra.* Moreover, it is not helpful to a resolution of the issue to speculate about what a State plan may be like in the future. Petitioners' plans for energy development are inhibited now by the regulations which exist now. Review is required to determine whether these regulations are lawful. That is a legal determination, not properly or necessarily aided by waiting either for future operation of the regulations or for their possible future amendment.

## CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Bruce Norton
Snell & Wilmer
3000 Valley Center
Phoenix, Arizona 85073

C. C. Dietrich
550 California Street
San Francisco, California 94104

Richard N. Carpenter
Bigbee, Byrd, Carpenter & Crout
P. O. Box 669
Santa Fe, New Mexico 85701

Robert M. Westberg
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

[List of Counsel For Respective Petitioners on Next Page]

DATED: October 29, 1976

## COUNSEL FOR PETITIONERS

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, comprised of:

Arizona Electric Power Cooperative, Inc.
Arizona Power Authority
Arizona Public Service Company
Cith of Anaheim
City of Burbank, Public Service Department
City of Colorado Springs, Department of Public Utilities
City of Glendale, Public Service Department
City of Los Angeles, Department of Water & Power
City of Pasadena, Water & Power Department
Colorado-Ute Electric Association, Inc.
El Paso Electric Co.
Imperial Irrigation District
Nevada Power Co.
Pacific Power & Light Co.
Public Service Co. of Colorado
Public Service Co. of New Mexico
Salt River Project Agricultural Improvement and Power District
San Diego Gas & Electric Co.
Sierra Pacific Power Co.
Southern California Edison Co.
Tucson Gas & Electric Co.
Utah Power & Light Co.

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Bruce Norton
Snell & Wilmer
3000 Valley Center
Phoenix, Arizona 85073

UTAH INTERNATIONAL, INC.

C. C. Dietrich
550 California Street
San Francisco, California 94104

Richard N. Carpenter
Bigbee, Byrd, Carpenter & Crout
P. O. Box 669
Santa Fe, New Mexico 87501

Robert M. Westberg
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

## APPENDIX A

The regulations at issue were first published, with preamble, in 39 Fed. Reg. 42509 *et seq.* (December 5, 1974) (40 C.F.R. §§ 50.01(d), (f), and 52.21). The text of the regulations within 39 Fed. Reg. 42509, *as amended*, 40 Fed. Reg. 2802 (January 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. Reg. 42011 (September 10, 1975) and a pertinent part of the preamble are set out in this appendix.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

**§ 52.01 Definitions.**

• • • • •

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications,

the source is designed to accommodate such alternative use.

* * * * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

* * * * *

**§52.21 Significant deterioration of air quality.**

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards.

The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction

or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2)(i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975:

*Area designations*

| Pollutant | Class I ($\mu g/m^3$) | Class II ($\mu g/m^3$) |
|---|---|---|
| Particulate matter: | | |
| Annual geometric means ..... | 5 | 10 |
| 24-hr. maximum ..... | 10 | 30 |
| Sulfur dioxide: | | |
| Annual arithmetic mean ..... | 2 | 15 |
| 24-hr. maximum ..... | 5 | 100 |
| 3-hr. maximum ..... | 25 | 700 |

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) the State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

*(a)* At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

*(b)* Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

*(c)* A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

*(d)* The proposed redesignation is based on the record of the State's hearing, which must reflect the

basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

*(e)* The redesignation is proposed after consultation with the elected leadership of local and other sub-state general purpose governments in the area covered by the proposed redesignation.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

*(a)* The redesignation is consistent with adjacent State and privately owned land, and

*(b)* Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

*(a)* The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

*(b)* Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where

States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

*(a)* The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c) (3)(ii) and,

*(b)* Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

*(a)* Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (*2*) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph, or (*3*) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

*(b)* Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (*2*) that the Federal Land Manager has arbitrarily

and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph.

*(c)* Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (*2*) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph.

*(d)* Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

*(e)* Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

*(f)* The requirements of paragraph (c)(3)(vi)*(a)*(3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement

action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of paragraph (c)(3)(vi)*(a)*(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975 except as specifically provided below. A source which is modified, but does not increase the amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xvii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this

paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or

modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall;

*(a)* Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

*(b)* Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

*(c)* Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of

the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting

source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)*(c)* of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

[The following portion of the preamble to the regulations is pertinent to this petition and is quoted in part therein. It appears at 39 Fed. Reg. 42512-13 (Dec. 5, 1974)]

There were several questions raised concerning the appropriate size of an area which should be considered for redesignation. Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for $SO_2$ could under some conditions violate the Class I increment for $SO_2$ 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an addi-

tional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

The distance a large source would need to be located away from a Class I boundary is more dependent on the meteorological conditions in the area rather than the size of the source. Where very long pollutant travel times from the source to the receptor are involved, the assumptions concerning the persistence of wind direction and atmospheric stability are critical. At some point, it can be assumed that a receptor will be virtually unaffected by a source, regardless of the source strength, since the critical meteorological conditions would not be expected to persist long enough to move the pollutants from source to receptor for any significant period of time. This distance is, of course, dependent on local meteorological conditions, but for most areas the maximum distance would be 60 to 100 miles.

## APPENDIX B

Relevant excerpts from the Constitution of the United States are as follows:

### ARTICLE III

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

## APPENDIX C

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

### § 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

**§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan**

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

**§ 1857d—1. [§ 116.] Retention of State authority**

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857f—6c(c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

**§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities; compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7 (c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted

during the preceding calendar year, together with his reason for granting each such exemption.

* * * *

**§ 1857h—2. [§ 304.] Citizen suits—Establishment of right to bring suit**

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

* * * *

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * * *

**§ 1857h—5. [§ 307.] Administrative proceedings and judicial review**

* * * *

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1 (b) (1) of this title), any determination under section 1857f—1(b) (5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

## APPENDIX D

The following Memorandum appears in 7 BNA Environmental Reporter, No. 23, at 859 (Oct. 8, 1976).

### ENVIRONMENTAL PROTECTION AGENCY GUIDANCE MEMORANDUM ON SIGNIFICANT DETERIORATION REGULATIONS — DATED SEPTEMBER 28, 1976

SUBJECT: Additional Guidance on Prevention of Significant Deterioration (PSD) Regulations

FROM: Roger Strelow
Assistant Administrator
for Air and Waste Management (AW-443)

MEMO TO: Regional Administrators

Questions arising from the Regions have indicated the need for further headquarters guidance on various aspects of the PSD regulation (40 CFR 52.21).

A. Several questions relate to 40 CFR 52.21 (d) (5), which reads as follows:

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

The purpose of paragraph (d) (5) is to insure that while a governing body is seriously pursuing the redesignation of an area to Class I, the redesignation will not be compromised or nullified by a new or modified source. I would like to stress several basic points about this provision:

1. The issue of which was first in time — the source's permit application or the governing body's announcement of resdesignation consideration — is irrelevant under paragraph (d) (5). If the governing body announces such reconsideration any time before a final permit has been issued, paragraph (d) (5) will be triggered.

2. A proposed source need not be located within the political boundaries of the governing body considering the redesignation in order for paragraph (d) (5) to apply. If the source's emissions could pose a threat to the proposed redesignation, then final permit approval would have to be withheld pending EPA's action on the proposed redesignation.

As is true of most aspects of the PSD regulations, the Regions will have to exercise their sound judgment on a case-by-case basis in determining whether a proposed source would be located far enough from the political boundaries of the governing body so as not to pose a threat to the proposed redesignation. This type of judgment should not present novel problems for the Regions, since the PSD regulation ultimately requires (in paragraph (d) (2) (i)) a finding that a source will not violate the applicable increments in any surrounding areas.

I realize that one could read paragraph (d) (5) in a very literal fashion to apply only to sources which would be constructed within the political boundaries of the governing body considering the redesignation. This interpretation would, however, do violence to the basic purpose of the PSD regulation (which is to insure that applicable air quality increments are not violated by new sources, without regard to the political boundaries a source might choose to locate within), and would do violence to the basic intent of paragraph (d) (5) (which

is to insure that a pending redesignation will not be jeopardized by a new source).

3. Paragraph (d) (5) will be triggered even where a governing body "announces consideration" of a proposed redesignation. There is good reason for allowing such an early triggering event, since EPA regulations and guidelines require the governing body to go through several procedural steps (including detailed document preparation) before the redesignation can even be formally proposed. If this approach were not taken, then a governing body which was actively and expeditiously endeavoring to secure a redesignation could still find the redesignation compromised or nullified by an intervening permit approval.

We must recognize, however, the potential for abuse in such a clause and take care to guard against it. The clause must not operate to allow a governing body to frustrate construction of a source if that governing body does not seriously intend to pursue a redesignation or does not pursue it actively and expeditiously.

Therefore, whenever a governing body announces it is considering a redesignation,[1] and that announcement would affect a proposed source's application, EPA should make clear to the governing body (in writing) that new source approvals will be withheld only so long as the governing body is actively and expeditiously proceeding towards redesignation. EPA should set forth a reasonable schedule of action considering all

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[1] No special form of "announcement" is required. Any evidence that the governing body, or an appropriate official thereof, has seriously determined to consider redesignation and has communicated this determination in writing to EPA should suffice. In any event, as discussed in the text above, the form of announcement is not nearly as important as the governing body's follow-up actions in determining whether paragraph (d) (5) should hold up a permit.

the circumstances of each case[2] and notify the governing body that any significant departure from that schedule, or any other evidence that the governing body is not actively and expeditiously pursuing redesignation, would be considered grounds for EPA to suspend the operation of paragraph (d) (5) and complete action on permits being withheld.

Such a suspension of paragraph (d) (5) should not occur automatically upon the failure of a governing body to meet a given deadline. Again, all relevant circumstances would have to be weighed. For instance, if a delay were caused through no fault of the governing body, it would probably be improper to suspend paragraph (d) (5). The main point is that EPA must remain satisfied that the governing body is doing all that can reasonably be expected to process the redesignation actively and expeditiously.

4. Paragraph (d) (5) only restricts EPA from granting permit *approval* while a redesignation is pending. A Region may therefore carry out all other provisions of paragraphs (d) and (e) in this period (*if* it chooses). This might have the salutary effect of "keeping the heat" on the governing body to complete its redesignation procedures. It might also, however, constitute in a Region's judgment an unwarranted diversion of resources for a permit which may never be issued. The Regions should use their own judgment in this area.

5. A Region may grant a permit pending a redesignation if the Region determines that the source would not violate the increments which would result from the redesignation.

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[2] *I.e.*, type of governing body (State? Indian Tribe?), number of potentially-affected jurisdictions, number of other governmental approvals needed, size of area affected, etc. It would probably be wise to develop this schedule in consultation with representatives of the governing body.

6. When a potential applicant contracts a Region about initiating the permit process, the Region should make the applicant aware of the implications of paragraph (d) (5) so that the applicant may be encouraged to complete its application expeditiously. Obviously, whenever paragraph (d) (5) is triggered, the Region should immediately notify those whose permit applications will be affected.

B. A question has been raised concerning the applicability of the PSD regulations to certain kinds of coal cleaning plants [§52.21 (d) (1) (ii)], specifically those that do not utilize a thermal dryer. Although the wording of the proposal of §52.21 (d) (1) (ii) read "coal cleaning plants (thermal dryers)" the final regulations read simply "coal cleaning plants." Region VIII has recently interpreted the PSD regulation to cover all coal cleaning plants, regardless of whether a thermal dryer is used. Region VIII's interpretation is correct.

C. One Region has questioned whether a PSD permit can be conditioned to require emission control that goes beyond best available control technology (as when a power plant intends to use low sulfur coal and a flue gas scrubber and will be well below the NSPS for $SO_2$ from power plants). Unless it is necessary to meet the applicable air quality increment, we can not *require* a source to go beyond BACT. However, should a source indicate on its permit application that its emissions will be less than that which we would ordinarily define as BACT, the lesser emission rate may be made an enforceable condition of the permit. The legally enforceable emission rate should be used for purposes of keeping track of the unused portion of the increment. Obviously, the situation where actual emissions are less than the legally enforceable emission rate presents the potential for a source to "hoard" a major portion of the remaining increment for future expansion. There-

fore, where a source will go beyond BACT, Regions should attempt to make the lesser emissions a legally binding permit condition.

D. Finally, some Regional Offices have requested a change to the PSD regulations enabling the Regional Administrator to require the applicants to perform the necessary diffusion modeling. We feel, and OGC concurs, that adequate authority to require such analysis is presently provided under §52.21 (d) (3), which indicates that EPA can require a source to submit ". . . information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels . . . ".

cc: Regional Counsels
Regional Air Directors
Regional Enforcement Directors

## APPENDIX E

The following parties to the consolidated proceedings in the court below are not, insofar as petitioners can determine, adverse to the positions taken in this petition, but are Rule 21(4) respondents:

BUCKEYE POWER, INC.
OHIO VALLEY ELECTRIC CORPORATION
INDIANA-KENTUCKY ELECTRIC CORPORATION
INDIANA & MICHIGAN ELECTRIC CORPORATION
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.
INDIANAPOLIS POWER AND LIGHT COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY
AMERICAN PETROLEUM INSTITUTE
STANDARD OIL COMPANY
ATLANTIC-RICHFIELD COMPANY
CONTINENTAL OIL COMPANY
EXXON CORPORATION
GULF OIL CORPORATION
MOBIL OIL CORPORATION
SHELL OIL CORPORATION
TEXACO, INC.
UNION OIL COMPANY OF CALIFORNIA
UTAH POWER AND LIGHT COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
PLATT RIVER POWER AUTHORITY
CHEYENNE LIGHT, FUEL AND POWER COMPANY
ALABAMA POWER COMPANY
GEORGIA POWER COMPANY
GULF POWER COMPANY

Mississippi Power Company
Edison Electric Institute
Kentucky Utilities Company
Cincinnati Gas & Electric Company
The Cleveland Electric Illuminating Company
Columbus and Southern Ohio Electric Company
The Dayton Power and Light Company
Kentucky Power Company
Ohio Edison Company
Ohio Power Company
Pacific Coal Gasification Company
Transwestern Coal Gasification Company
Montana Power Company
Pacific Power and Light Company
Portland General Electric Company
Puget Sound Power & Light Company
Washington Water Power Company